

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

KEVIN E. DENNIS,

Petitioner,

v.

CASE NO. 2:07-CV-1313
CRIM. NO. 2:05-CR-248(2)
JUDGE SARGUS
MAGISTRATE JUDGE KING

UNITED STATES OF AMERICA,

Respondent.

REPORT AND RECOMMENDATION

On March 2, 2009, the Court directed petitioner to submit, within ten (10) days, a written waiver of his attorney-client privilege as it pertains to the claims raised in the motion to vacate, set aside, or correct sentence under 28 U.S.C. §2255. Doc. No. 59. The docket indicates that this Court's order was delivered to the prison where petitioner resides on March 9, 2009. Doc. No. 60. On March 20, 2009, petitioner's written waiver of his attorney-client privilege was filed. Doc. No. 62. Petitioner asserts, however, that a copy of the waiver was mailed by petitioner to respondent's attorney on March 16, 2009. *Id.* Respondent has filed a request that this action be dismissed because petitioner failed to submit his attorney-client waiver within ten (10) days of the Court's order directing him to do so. *See* Doc. No. 61.

It appears that petitioner mailed his waiver within ten (10) days of the date that he received notice of the *Order*. *See Houston v. Lack*, 487 U.S. 216 (1988)(filing by inmate is effective upon deposit in prison mailbox). Moreover, respondent has failed to articulate,

and the record does not reflect, any prejudice to the United States by reason of the timing of petitioner's written waiver of his attorney-client privilege. Under these circumstances, it is **RECOMMENDED** that the Court **DENY** respondent's request that the petition be dismissed. Respondent is **DIRECTED** to submit a supplemental response to petitioner's claim of ineffective assistance of counsel, including a response to petitioner's allegation that his attorney improperly failed to file an appeal after being requested to do so, within twenty (20) days of the date of this *Report and Recommendation*.

If any party seeks review by the District Judge of this *Report and Recommendation*, that party may, within ten (10) days, file and serve on all parties objections to the *Report and Recommendation*, specifically designating this *Report and Recommendation*, and the part thereof in question, as well as the basis for objection thereto. 28 U.S.C. §636(b)(1); F.R. Civ. P. 72(b). Response to objections must be filed within ten (10) days after being served with a copy thereof. F.R. Civ. P. 72(b).

The parties are specifically advised that failure to object to the *Report and Recommendation* will result in a waiver of the right to *de novo* review by the District Judge and of the right to appeal the decision of the District Court adopting the *Report and Recommendation*. See *Thomas v. Arn*, 474 U.S. 140 (1985); *Smith v. Detroit Federation of Teachers, Local 231 etc.*, 829 F.2d 1370 (6th Cir. 1987); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981).

March 25, 2009

s/Norah McCann King
Norah McCann King

United States Magistrate Judge